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THE CURRENT UNCERTAINTY SURROUNDING ARBITRATION CLAUSES

Two recent contradictory Ohio appellate court decisions have caused uncertainty about the enforceability of arbitration clauses in automobile sales contract. The first case originated from Cuyahoga County. The Common Pleas Court determined that an arbitration clause contained in a dealership's sales contract was not enforceable. On appeal the decision was reversed with a finding that the arbitration clause was enforceable. The clause read:

“ARBITRATION – Any dispute between you and dealer (seller) will be resolved by binding arbitration. You give up your right to go to court to assert your rights in this sales transaction (except for any claim in small claims court). Your rights will be determined by a neutral arbitration not a judge or jury. You are entitled to a fair hearing, but arbitration procedures are simpler and more limited than rules applicable in court. Arbitrator decisions are enforceable as any court order and are subject to a very limited review by a court. See General Manager for information regarding arbitration process.”

The second case originated from Summit County. The Common Pleas court held that the arbitration clause was enforceable; the appellate court disagreed and ruled that the clause was not enforceable. The clause read in relevant part:

“JURY WAIVER AND AGREEMENT TO BINDING ARBITRATION - The undersigned consumer and [dealership], by its acceptance hereof, hereby voluntarily, knowingly, irrevocably, and unconditionally waive any right to have a jury participate in resolving any dispute, whether based on contract, tort, under a statute or otherwise, and whether the money damages, penalties or declaratory or equitable relief, between or among the undersigned and [dealership], arising out of or in any way related to the contract between the parties for the purchase, lease or repair of any vehicle from or by [dealership] and any other related document or any relationship between the undersigned consumer and [dealership]. In addition the parties voluntarily, knowingly, irrevocably and unconditionally agree that any dispute between them, whether based on contract, tort, under a statute or otherwise, and whether for money damages, penalties or declaratory or equitable relief, shall be resolved by binding arbitration.”

* * * The next several paragraphs of the clause have been omitted in order to conserve space. The paragraphs name the National Arbitration Forum (NAF) as the arbitrator; set forth arbitration procedures by citing to the NAF's website, which included a confidentiality provision; and extended the clause's application to all businesses associated with the dealership.

The result of this arbitration section is that, except as provided above, claims cannot be litigated in court including some claims that could have been tried before a jury, as class actions or as a private attorney general action.

These provisions are a material inducement to [dealership] to provide the goods and/or services herein described in the attached contract or in any other related documents. . .”

In ruling the arbitration clause was not enforceable, the court focused on the following: 1) the limitations the arbitration clause imposed on the consumer's rights, 2) the prohibitively expensive arbitration fees and costs, 3) the fact that the consumer was not able to remove the clause (called an adhesion contract because the consumer is “stuck” with the clause), and 4) the denial of the public's access to consumer information as a result of the confidentiality provision. The court also focused on the disparity of bargaining power between the consumer and the dealership and the fact that the clause was presented on a “take it or leave it” basis.

Some of the important considerations when drafting an arbitration clause are: 1) is the arbitration clause fair to the consumer? 2) Did the consumer have a meaningful choice to accept or not accept the clause? 3) Will the consumer be required to pay fees and costs for arbitration that are far in excess of the filing fees and costs for litigation? 4) Was the arbitration clause explained to the consumer in a way that is appropriate for the consumer's age, education and business savvy? 5) Was the arbitration clause contained in the “fine print?”

Because of the current uncertainty of the enforceability of arbitration clauses, it is important to have your arbitration clauses and your closing procedures reviewed by an attorney. A well-schooled attorney will be able to increase the odds of an arbitration clause being subsequently enforced in court.